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ABSTRACT

J. Stanley Pottinger, Assistant Attorney General in charge of the Civil Rights Division (CRD) of the Department of Justice, was invited to testify before the committee concerning the existence and extent of discrimination in the public broadcasting industry. The Justice Department was concerned with the Civil Rights Act, Title VI. Members of his Federal Program Section met with officers of the Corporation for Public Broadcasting (CPB) during the latter of 1974 to discuss their responsibilities under Title VI, and to attempt to develop an enforcement program. Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. The General Counsel for CPB expressed the view consistently that, because CPB is not a government agency, it is not subject to the requirements of Title VI. CRD's position was then, and is now, that while CPB may not be a government agency, this means only that they are not required to adopt the regulating procedures envisioned by that section; but the corporation, being a recipient of Federal funds, is still subject to the nondiscrimination provisions, and more importantly, is responsible for their subrecipients' use of subgrants. (Author/JM)

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STATEMENT

OF

J. STANLEY POTTINGER
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS
HOUSE OF REPRESENTATIVES

CONCERNING

ENFORCEMENT OF EQUAL OPPORTUNITIES AND
ANTI-DISCRIMINATION LAWS IN THE PUBLIC BROADCASTING INDUSTRY

ON

AUGUST 9, 1976

UD 016274

Mr. Chairman, I am J. Stanley Pottinger, Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice. I would like to thank the Committee for inviting me to appear to testify in this hearing concerning the existence and extent of discrimination in the public broadcasting industry. I support the efforts of this Committee in addressing the difficult problem of balancing the need for minority representation in public broadcasting with the policy of minimizing government interference with that industry.

The Act of Congress with which the Justice Department is concerned is the Civil Rights Act of 1964, and specifically, the provisions of Titles VI and VII of that law. Title VI, in section 601, prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. The enforcement mechanism created by Title VI, found in Section 602, requires "each Federal department and agency which is empowered to extend Federal financial assistance" to set up rules and regulations applicable to recipients of the financial assistance provided by the agency requiring non-discrimination, and providing for an enforcement procedure which permits either the termination of

the financial assistance or any other action permitted by law--usually referral to the Attorney General for institution of litigation.

Under Title VI, primary responsibility for enforcing the prohibitions against discrimination is placed on the agency granting the assistance. However, Executive Order 11764, signed January 21, 1974, places the responsibility on the Attorney General to "coordinate enforcement by the Federal departments and agencies of Title VI...", to "prescribe standards and procedures regarding implementation of Title VI..." and to "assist the departments and agencies in accomplishing effective implementation."

The Attorney General may also adopt rules and regulations in aid of this responsibility, and proposed rules were published in the Federal Register on July 29, 1976.

In our role as attorneys for the federal government, we also file and prosecute civil actions to enforce federal requirements of the various federal agencies concerned with enforcement.

In connection with our responsibilities under the executive order, members of my Federal Programs section met with representatives of the Corporation for Public Broadcasting during the latter part of 1974 to discuss what I believed were their responsibilities under Title VI, and to attempt to develop an enforcement program. These meetings culminated in a letter which I sent on March 26, 1975, to Mr. Thomas G. Gherardi, General Counsel for CPB, containing the opinion of my Division that CPB was obligated to insure that the federal funds received and distributed by CPB were expended in accordance with the provisions of Title VI. I am submitting a copy of that letter, and I believe that some members of the Subcommittee may already be familiar with it.

Following receipt of this letter, Mr. Gherardi asked to discuss the matter with me and my staff. We met on June 2, 1975, and members of my staff met several times thereafter with CPB officials. Mr. Gherardi expressed the view consistently that because CPB is not a government agency, it is not subject to the requirements of Title VI. Our position was then, and is now, that while CPB may not be a government agency within the meaning of Section 602,

this means only that they are not required to adopt the regulating procedures envisioned by that section; but the corporation, being a recipient of federal funds, is still subject to the non-discrimination provisions of Section 601, and more importantly, is obligated to insure that sub-recipients do not use their sub-grants in ways which will exclude racial and ethnic minorities from the benefits that those grants provide. This view was expressed in my letter of August 12, 1975, to Mr. Gherardi, a copy of which I am also submitting.

CPB has, of course, published a non-discrimination policy to each of its sub-grantees. However, this policy relies on federal courts and agencies to determine whether there have been violations of the discrimination prohibitions and I have advised CPB that I do not believe this alone fulfills their responsibilities under Title VI.

Officials of CPB have indicated that more affirmative action on their part is not possible because of their limited staff. I have suggested that CPB, in view of this limitation, might make arrangements with the Department of Health, Education and Welfare to make compliance reviews on terms satisfactory to both HEW and CPB since HEW already

has the responsibility for enforcing Title VI with regard to educational grants to some public television stations.

The efforts of my division represented an attempt to set up an enforcement mechanism through CPB--a mechanism which would, through the carrot and stick use of federal funds, not only insure that minority interests are represented in public broadcasting, but would decide what the nature of that representation is to be. We have not attempted to define for CPB the area of public broadcasting which needs attention. It is obvious, however, that what is important in the use of these funds is that minority interests somehow be served in programming. This need presents very delicate problems for any government agency which enters this field, given its sensitivity, and the general purpose of Congress expressed in 47 U.S.C.

396(a)(6) that public broadcasting be protected from "extraneous interference and control." So while it is my belief that CPB has the expertise and authority to make judgments about minority programming, I do not believe that I or my Division should be directly involved in making such decisions.

Subsequent to our contacts with CPB, the Congress considered and passed the Public Broadcasting Financing Act of 1975, which provides for five additional years' authorization for federal funds to the public broadcasting industry. During the consideration of that Act, there was an attempt to amend it in the House so that CPB would be required to assume a regulatory function with regard to Title VI. The conference committee which deleted that amendment, in House Report No. 94-713, 94th Congress, 1st Session, p. 7, reported:

[The Senate conferees'] objections were based on a technical problem in the amendment and on a concern that the House language would place the Corporation for Public Broadcasting in the posture of a Federal department or agency responsible for promulgation and enforcement of civil rights regulations. The Senate conferees stated that placing CPB in such a posture would be in clear conflict with the intent of Congress to establish CPB as a private corporation in section 396 (h) of the Act.

Moreover, the Senate conferees were of the view that existing Federal agencies mandated to enforce civil rights laws should be required to implement those laws with regard to public broadcasting, rather than placing this responsibility on CPB.

So it now appears that those efforts which we made to persuade CPB to assume an active enforcement role with regard to Title VI may well be beyond what, at least, the Senate conferees, and perhaps the Congress believe they should be required to do. Unfortunately, this leaves a significant amount of federal money in an enforcement vacuum. As I indicated, the Department of Health, Education and Welfare exercises some oversight of Title VI compliance of some public television stations which receive educational grants and facilities money through HEW and not through CPB, but no federal agency dispenses CPB funds by way of "grant, loan or contract", the way most federal funds are distributed, and therefore, under existing law, there is no federal agency, other than CPB, on which to place the primary enforcement responsibility envisioned by Title VI for those funds dispensed by CPB. It was for this reason that we thought that CPB might enter into an agreement with HEW (or another

Title VI agency) by which that agency might use its established civil rights resources to monitor not only HEW grantees, but also CPB grantees, and report their findings to CPB for whatever action might be indicated. This would cover federal money presently in a vacuum. As I reported earlier, neither this arrangement nor our other variation on this theme has come to pass.

The Subcommittee may wish to consider whether direct involvement of some executive agency in programming decisions of public broadcasting is a desirable thing. Certainly, it would not advance the interest of the public generally that extensive regulation of this subject matter be performed. Yet, Title VI language seems to apply to programming decisions, as well as others, in federally funded broadcasting. We suggest that a more desirable way to accomplish this goal would be to insure minority representation on the policy making bodies of public broadcasters which receive federal funds. In this way, we would tend to avoid programming decisions by federal civil rights compliance offices, which presumably do not have the expertise to make such decisions, but would help to insure that minority viewpoints, of and by the locality involved, are taken into account in programming

decisions.

As the Subcommittee may be aware, government agencies are prohibited by Section 604 of Title VI from taking action under that Title with respect to any employment practices. Nonetheless, I believe that if requiring minority representation on policy making bodies is the only realistic way to carry out the purposes of Title VI, then that is what should be done.

Again, the question is: Who is to enforce such a requirement? In accordance with the statutory scheme, the Justice Department has, in the past, brought suits to enforce Title VI with respect to various types of federal grants upon referral from federal agencies having regulatory responsibilities over the funds provided. In public broadcasting, no agency has referred such a case to us.

Some regulation of employment, as well as broadcasting practices is done by the FCC in connection with its licensing authority. See, e.g. 47 CFR §§21.307, 76-311 and Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). This arises from the FCC's duty to grant and revoke licenses in the public interest, but nothing to do with the way federal

funds going through CPB are used, funds which appear to be subject to Title VI.

Another means of regulating employment practices is through Title VII of the 1964 Civil Rights Act.

This Act makes it an unlawful employment practice for any employer:

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race, color, religion, sex, or national origin.

The principal enforcing agency for this Title is the Equal Employment Opportunity Commission. However, the Attorney General does have the authority under Section 706(f) to bring civil actions against employers which are state or local government or government agencies, upon a referral of a complaint from EEOC. In addition, it is our position that the Attorney General has authority to bring suits against state agencies which are engaging in a "pattern or practice"

of employment discrimination under Section 707. Without detailing all the provisions of that section, I should note that two district courts have disagreed with us on the existence of that authority, and have dismissed pattern or practice suits on that basis. We are appealing those decisions, but until that authority is clarified, our ability to act in the area of employment discrimination without a referral from EEOC will be uncertain. While our authority to bring suits to redress complaints referred to us from EEOC remains intact, we have not received a referral from EEOC in the area of public broadcasting. I am not certain of the extent to which public broadcasting stations are state agencies, and that would, of course, determine whether any suits, if suits are appropriate, should be handled by EEOC or the Attorney General.

However, focusing on individual complaints of discrimination, or even "pattern and practices" of discrimination in employment generally, may be somewhat off the point in the field of public broadcasting. If the inquiry is solely about employment for the sake of employment, of course there is nothing which sets the broadcasting industry apart from any other industry, or

makes it deserving of the special attention of a committee of Congress. But, if the concern is about employment practices because of what they mean to the interests of minorities and women in receiving the benefits of public broadcasting, then the problem should be addressed directly. The usual employment discrimination suit may or may not deal with this problem effectively. In fact, Section 701(f) of Title VII may exempt from coverage many policy making positions of state-operated public broadcasters.

This brings me again to the Title VI enforcement issue. The way that minority interests will be represented in public broadcasting and the way that minorities will find their way into the policy making positions and broadcasting images of the public broadcasting industry is through enforcement of Title VI by regulation, investigation and review of upper level staffing decisions. But this cannot be done until it is settled who has the responsibility to perform that function, and by what standards it should be performed, keeping in mind the sometimes conflicting objective of programming unfettered by federal directives on the one hand, and fair nondiscriminatory programming and employment for which someone in the federal government must have responsibility on the other.